

## **Exhibit C**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In Re: : Case No. 05-60006  
REFCO, INC., et al, :  
Debtors. : One Bowling Green  
New York, NY  
March 14, 2006  
-----X  
: :  
OFFICIAL COMMITTEE OF UNSECURED : 05-03331  
CREDITORS, :  
Plaintiffs, :  
v. :  
JOHN DOE, et al., :  
Defendants. :  
-----X

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: ANTHONY W. CLARK, ESQ.  
Skadden, Arps, Slate, Meagher  
& Flom, LLP  
Four Times Square  
New York, New York 10036  
For Official Committee: LUC A. DESPINS, ESQ.  
DENNIS C. O'DONNELL, ESQ.  
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One Chase Manhattan Plaza  
New York, New York 10005

(Appearances continued on next page)

1 settlement issues that --

2 FEMALE VOICE: We wish to talk among ourselves.

3 THE COURT: If you want to talk among yourselves,  
4 that's fine too.

5 MR. MOLONEY: Your Honor, I think if we could have a  
6 five minute recess --

7 MR. CLARK: How about ten?

8 MR. MOLONEY: -- followed by a chambers conference  
9 that would be asked.

10 MR. CLARK: That would be, I think, a very  
11 constructive --

12 THE COURT: All right.

13 I think to be fair I should include the Leuthold  
14 people in that as well and Mr. Dash.

15 Although my chambers are pretty small.

16 MR. CLARK: Could we make that ten minutes, Your  
17 Honor?

18 THE COURT: Yes, that's fine.

19 (Recess.)

20 (Proceedings resume at 6 p.m.)

21 THE COURT: Please be seated.

22 We've had -- for Bankruptcy Court-- a lengthy trial  
23 with numerous witnesses. We're up to 5,000 pages of exhibits  
24 and deposition testimony and the like on what had appeared to  
25 me and continues to appear to me to be an essential issue in

1 these Chapter 11 cases; that is, whether Refco Capital  
2 Management Ltd., or "RCM," one of the debtors here, is a  
3 "stockbroker" under the Bankruptcy Code, and consequently, is  
4 ineligible to be a debtor under Chapter 11, and must have its  
5 case proceed, if at all, under subchapter 3 of Chapter 7 of the  
6 Bankruptcy Code, the stockbroker liquidation provision.

7           It's a gating issue for two reasons, primarily  
8 because under the stockbroker liquidation provisions of  
9 subchapter 3 of Chapter 7, "customers" have a statutory  
10 priority as to "customer property" or property in the "customer  
11 fund," which is the fund of properties that may be attributable  
12 -- or of securities or cash that may be attributable to those  
13 customers' claims, even though, as is the case here, it is  
14 commingled and insufficient, potentially, to satisfy the claims  
15 in full and not identifiable customer property.

16           Given that priority, there's a potentially large  
17 swing in value between or among RCM's creditors, not only from  
18 the pockets of potentially FX-related creditors and derivatives  
19 or commodities-related creditors of RCM, but also even some  
20 customers who at this point may be comfortable with their net  
21 equity ratios of recovery *vis-a-vis* the other customers who  
22 engaged in securities trading.

23           That's an important issue not only economically but  
24 also, importantly, because under Section 1129(a)(7) of the  
25 Bankruptcy Code, a Chapter 11 plan cannot be confirmed over the

1 objection of a single creditor if that creditor would do better  
2 in a Chapter 7 case. And the potential swing in value here  
3 might well give individual creditors veto rights over a Chapter  
4 11 plan.

5           It's also important because conversion of the case to  
6 Chapter 7 would result in the appointment of a trustee for RCM,  
7 and it has been the view of not only the customer group but  
8 other creditors of RCM that notwithstanding the general policy  
9 in this district and in the Second Circuit not to appoint  
10 multiple trustees in -- administratively consolidated cases,  
11 even where there are substantial intercompany claims, here, for  
12 a number of reasons, they have argued it makes sense to have an  
13 independent fiduciary for RCM.

14           Having heard all of the testimony and reviewed the  
15 exhibits and heard oral argument and read the excellent briefs  
16 submitted by all the parties in this contested matter, I'm  
17 prepared to rule on it.

18           However, as noted before we broke about an hour ago,  
19 I wanted to consider Mr. Despins' suggestion as well as the  
20 views of the other parties as to whether given the plain  
21 language of Section 1112 of the Code, which does clearly permit  
22 me to either defer a ruling or, perhaps less -- less clearly to  
23 rule but not actually order conversion for a while, I should in  
24 some form defer or delay.

25           We had a chambers conference with the -- I would say

1 the parties who have expressed the most interest in the RCM  
2 case including, creditors of other entities like Bank of  
3 America and the bondholders, as to their views as to whether it  
4 would make sense to give a Chapter 11 plan process time, and  
5 having heard the parties and considered the issues myself, I  
6 think that it is appropriate to, A, give the parties very clear  
7 guidance in the form of a preliminary ruling, which I fully  
8 expect not to change, regarding my decision on the motion by the  
9 moving customer group, but then to give the parties time  
10 subject to some conditions, in light of that ruling to see if  
11 they can negotiate a more comprehensive agreement or at least a  
12 basis for a Chapter 11 plan that might resolve all of the  
13 issues.

14           So what I'm going to issue now is, in fact, a  
15 preliminary ruling. I did not intend, except as I will  
16 specifically lay out, to issue any orders flowing from this  
17 ruling for some time, and I trust that in light of Section 1112  
18 and the clearly expressed interests of all the interested  
19 parties, that all will recognize that this procedure is  
20 intended to give parties time to work together to maximize  
21 their collective recoveries in light of what I think the proper  
22 priority decision should be.

23           The Bankruptcy Code in Section 109(d) limits the  
24 entities that may be a debtor under Chapter 11, and it  
25 specifically provides that a stockbroker or a commodity broker

1 may not be a Chapter 11 debtor. See 11 U.S.C. § 109(d) as well  
2 as In Re: Bevill, Bressler & Schulman, Inc., 94 BR. 817, 828  
3 (Bankr. D. N.J. 1989).

4 Liquidations of stockbrokers regulated by the SEC are  
5 subject to the provisions of the Securities Investor Protection  
6 Act, or SIPA, found at 15 U.S.C. § 78 et seq., which  
7 incorporates certain provisions of the Bankruptcy Code, and  
8 generally contemplates the application of the Bankruptcy Code  
9 where SIPA itself is silent.

10 However, if a stockbroker is not regulated by the  
11 SEC, for example, because it is an intrastate stockbroker, its  
12 liquidation is governed by the provisions of subchapter 3 of  
13 Chapter 7 of the Bankruptcy Code. See HR Rep. No. 95-595 at  
14 268 (1978), and 6 Collier on Bankruptcy, Paragraph 740.01 at  
15 740-1.

16 The definition of "stockbroker" is set forth in  
17 Section 101(53A) of the Bankruptcy Code, and on its face it is  
18 pretty simple. It means a person, which includes entities,  
19 (A), with respect to which there is a customer as defined in  
20 Section 741(2) of the title 11and, (B), that is engaged in the  
21 business of effecting transactions and securities either for  
22 the account of others or with members of the general public  
23 from or for such person's own account.

24 In other words, the first element of the definition  
25 requires us to determine whether there is a "customer," and it

1 has been frequently stated that even if a court finds there is  
2 only one customer that satisfies that aspect of the definition,  
3 although clearly I have to find the existence of an actual  
4 customer, not a hypothetical one or not one, as some cases have  
5 stated, "in the air." See In Re: ESM Government Securities,  
6 52 B.R. 372, 275 (S.D. Flor. 1985), affirmed 812 F.2d. 1374  
7 (11th Cir. 1987), and In Re: SSIW Corporation, 7 B.R. 735,  
8 738, N. 19 (Bankr. S.D.N.Y. 1980).

9           Effectively, the rationale for having a separate  
10 scheme under subchapter 3 giving a priority to customer claims  
11 for customer property is that customers as defined in Section  
12 741(2) of the Bankruptcy Code would not be protected under the  
13 distribution scheme under Chapter 11 because their interests  
14 are substantially different than those creditors normally  
15 associated with cases under Chapter 11 and its distribution  
16 scheme, in that they -- that is, the securities customers under  
17 Section 741(2) effectively entrust their securities with the  
18 debtor. See HR. Rep. No. 95-595 at 319.

19           Focusing first on the definition of "customer," one  
20 begins and in all likelihood ends with the plain language of  
21 the statute, as the Supreme Court has instructed us to do in  
22 Ron Pair, 489 U.S. 235, 242-43 (1989).

23           A customer is defined in Section 741(2) of the  
24 Bankruptcy Code as:

25           "An entity with whom a person" -- that is, the debtor



1 -- "deals as principal or agent and that has a claim  
2 against such person on account of a security  
3 received, acquired or held by such person, again by  
4 the debtor," in the ordinary course of such person's  
5 business as a stockbroker, from or for the securities  
6 account or accounts of such entity."

7 And then the definition lists six ways in which such  
8 person may hold such securities; i.e., for safekeeping, with a  
9 view to a sale, to cover a consummated sale, pursuant to a  
10 purchase, as collateral under a security agreement, or finally  
11 for the purpose of effecting registration of transfer.

12 And then, secondly, the "customer" definition  
13 requires that such entity has a claim against the debtor  
14 arising out of either a sale or conversion of a security  
15 received, acquired or held as specified in subpart (a), or a  
16 deposit of cash, a security or other property with such person  
17 for the purpose of purchasing or selling a security as set  
18 forth in subpart (b).

19 It should be noted that an entity may be a customer  
20 if it satisfies either Subsections (a) or (b) under Section  
21 741(2) notwithstanding that these conditions are joined in the  
22 conjunctive making it appear that both conditions need to be  
23 satisfied. Again, see ESM Government Securities, Inc., 812  
24 F.2d. 1374, 1376 and In Re: Residential Resources Mortgages --  
25 Mortgage Investment Corporation, 98 B.R. 2, 21 (Bankr. D. Ariz.

1 1989).

2           The definition of "customer" as it appears in SIPA is  
3 basically the same as the definition appearing in the  
4 Bankruptcy Code, and, therefore, cases construing SIPA's  
5 definition of customer under 15 USC §78(111)(2) are also  
6 applicable to the definition under Section 741(2) of the  
7 Bankruptcy Code. See In Re: Swink & Company, 142 B.R. 874,  
8 876 (Bankr. E.D. Ark. 1992).

9           Although the legislative history states that the  
10 definition of the term customer was meant to encompass any  
11 person that interacts with the debtor in a capacity that  
12 concerns securities, whether such person is a cash or margin  
13 client of a broker or a dealer, see H.R. Rep. No. 95-595 at  
14 385, and, although the term is not found in Section 741(2) or  
15 the analogous definition in SIPA, it has been long and widely  
16 held that "entrustment" of property with the broker or dealer  
17 or a broker-dealer is dispositive in determining whether a  
18 person or entity fits into the Bankruptcy Code's definition of  
19 customer.

20           I should, note before going further on the topic of  
21 "entrustment," however, that the customer definition very  
22 clearly does include parties who have margin accounts and  
23 engage in financing activities with their securities with a --  
24 with a stockbroker. This is stated repeatedly by Collier at --  
25 for example, Paragraph 741.03[3][a], in which the editors of

1 Collier state that customer securities are either fully paid  
2 for or are held in a margin account. Further, it's clear that  
3 -- in fact, from the operative provisions of subchapter 3 that  
4 such securities may be commingled and that they need not be  
5 segregated. In fact, that's the reason for the priority in  
6 customer property. As Collier says in Paragraph 741.03[3][a],  
7 again:

8 "Under the Bankruptcy Code, all customers, regardless  
9 of the nature of their accounts, are entitled to  
10 share in the pool of customer property (which is, in  
11 effect, the sum of specifically identical  
12 identifiable property in the single and separate  
13 fund) to the extent of their respective net equity  
14 claims."

15 Again, at Paragraph 741.03[3][a], the editors say:

16 "Under the Bankruptcy Code and SIPA, both margin and  
17 cash customers share ratably in the fund of customer  
18 property to the extent of their respective net equity  
19 claims. As the fund of the customer property is  
20 comprised of *fungible* property, all customers have an  
21 equal claim to that pool."

22 Indeed, under Paragraph 741.04[2], the editors of Colliers go  
23 so far as to say:

24 "Under the Bankruptcy Code, fungibility is carried to  
25 its greatest degree in permitting all customers to

1 share ratably in the cash proceeds of customer  
2 property irrespective if particular customer  
3 securities were, in fact, available (i.e., present)  
4 to be liquidated. Thus, a customer whose securities  
5 have been lost, stolen, improperly hypothecated or  
6 otherwise unavailable to the trustee will still share  
7 in customer property based upon the customer's net  
8 equity claim."

9 See Collier, ¶ 741.05[3].

10 Again, "entrustment" of customer property is a  
11 dispositive element of Section 742(2) as well as under SIPA.  
12 See In Re: Hanover Square Securities, 55 B.R. 235, 238 (Bankr.  
13 S.D. NY 1985), citing a number of cases from the Second Circuit  
14 and others, which hold in each case that the purported customer  
15 was really engaged in a different type of relationship with the  
16 debtor such as that of a lender, citing SIPA v. Executive  
17 Securities Corporation, 556 F.2d. 98-99 (2nd Cir. 1977), in  
18 what the purported customer was really a lender to the debtor,  
19 SEC v. F.O. Baroff, Inc., 497 F.2d. 280, 284 (2nd. Cir. 1974),  
20 in which the purported customer was rally an investor in the  
21 debtor.

22 That is, entrustment of one's securities with another  
23 is said to distinguish a true customer relationship from  
24 various other dealings with broker-dealers that might be shoe-  
25 horned into the definition but do not, in fact, satisfy the

1 statute. See also In Re: Baker & Getty Financial Services,  
2 Inc., 106 F.3d. 1255, 1260 (6th Cir. 1997).

3 Entrustment in this context essentially means that  
4 the transaction must be related to the purported customer's  
5 investment, trading or participation in the securities market.  
6 Again, see In Re: Hanover Square Securities, Inc., 55 B.R. at  
7 238. And in that context it is often said without much  
8 analysis the transaction must have created a fiduciary  
9 relationship. See In Re: Stalvy & Associates, Inc.  
10 (phonetic), 740 F.2d. 464, 471 (5th Cir. 1985). A fiduciary  
11 relationship exists when one person is under a duty to act for  
12 or to give advice for the benefit of another upon matters  
13 within the scope of the relationship. Flickinger v. Harold C.  
14 Brown & Company, 947 F.2d. 595, 599 (2nd. Cir. 1991).

15 It has been held that generally a broker does not owe  
16 fiduciary duties to a purchaser of securities, its customer.  
17 A. Ronald Sirna, Jr., P.C. Profit Sharing Plan v. Prudential  
18 Securities, Inc., 964 F. Supp. 147, 152 (S.D.N.Y. 1997).  
19 However, fiduciary duties may exist between a broker and  
20 customer when the broker has discretion over the customer's  
21 property or has been, again, given direction to act and has  
22 accepted a responsibility to act on a customer's behalf. See  
23 Press v. Chemical Investment Securities Corp., 988 F. Supp.  
24 375, 386 (S.D.N.Y. 1997), which was later affirmed by the  
25 Second Circuit in a case I'll discuss in a moment. See also

1 Lowenbran v. L.F. Rothschild (phonetic), 685 F.Supp. 336, 334  
2 (S.D.N.Y. 1998).

3 More specifically, the Second Circuit held in the  
4 Press v. Chemical Investment Sec. Corp., 166 F.3d. 529, 536  
5 (2nd. Cir. 1999) that the fiduciary obligation that arises  
6 between a broker and a customer as a matter of New York common  
7 law is limited to matters relevant to affairs entrusted to the  
8 broker. The scope of the entrusted affairs generally is thus  
9 limited to the completion of the security transaction. *Id.*

10 In some respects then, or in large measure, the  
11 requirement, to the extent there is one under Section 741(2),  
12 that the debtor be a fiduciary to its customer to qualify the  
13 customer as a "customer" is largely redundant or overlaps with  
14 the notion that the customer entrusts its securities with the  
15 broker to effectuate a transaction, because, again, in the  
16 words of Press, it's in that context that a broker becomes a  
17 fiduciary; that is, in completing the securities transaction  
18 that the customer has asked.

19 It appears clear to me in reading the customer  
20 agreements that the moving customer group members signed with  
21 RCM that this was the nature of the relationship between them  
22 and RCM. As Paragraph A1 of the customer agreement says, you  
23 hereby -- I'm sorry. Authority to act:

24 "You hereby authorize Refco to purchase, sell,  
25 borrow, lend, pledge, or otherwise transfer financial

1 instruments, including any interest therein for your account in  
2 accordance with your oral or written instructions.

3 "The authority hereby conferred shall remain in full  
4 force until written notice of its revocation is received by  
5 Refco."

6 The testimony of Mr. York and others was also to the  
7 same effect, that his -- his business was not proprietary but  
8 was in taking customer instructions in effectuating  
9 transactions in securities.

10 The objectants to the motion nevertheless contend that  
11 there was no entrustment here for a number of reasons. In  
12 essence, all of them boil down to an argument that the movants  
13 knew or should have known that they ran the risk of RCM not  
14 being able to return their securities, not only as an economic  
15 matter but as a legal matter.

16 The first such argument is that it was clear that RCM  
17 was an unregulated -- I'm sorry, was unregulated under the U.S.  
18 securities laws, and that is, that it was not a broker-dealer  
19 like its affiliate, RSL, and, therefore, that the customers  
20 would not be protected under SIPA, for example, or in respect  
21 of various requirements of the U.S. securities laws that  
22 pertain to margin trading and the like that a broker-dealer  
23 engages in if it is regulated by the U.S. securities laws.

24 It is clear, however, that subchapter 3 of Chapter 7  
25 applies to unregulated -- I'm sorry, to entities who are

1 unregulated under the U.S. securities laws. The legislative  
2 history I referred to earlier clearly makes that point in  
3 respect of intrastate stockbrokers. It's also implicit and  
4 explicit in the holding of the Baker & Getty case, which  
5 applied to an unregulated U.S. entity whose affiliate was  
6 regulated. See 106 F.3d. 1255.

7 I'd also note a quote from -- on this point from SEC  
8 v. Ambassador Church Finance/Development Group, Inc., 679 F.2d  
9 608, 614 (6th Cir.) that Judge Brozman excerpted in her Hanover  
10 Square Securities case at 55 BR 240. There, the Sixth Circuit  
11 said:

12 "The appellants make much of the fact that [the  
13 broker-dealer] did not maintain a customer account in  
14 the name of the church and did not charge a  
15 commission for selling the incentive bonds. It is  
16 not likely that Congress, in seeking to protect the  
17 assets of small transaction customers of broker-  
18 dealers, intended to make eligibility for protection  
19 depend on whether the broker complied with rules of  
20 the SEC or practices of the trade. These are matters  
21 over which the broker has complete control. The  
22 trusting customer is not to be penalized for choosing  
23 a careless, unethical or dishonest broker."

24 Now, obviously, that quote referred to  
25 unsophisticated customers, but I think the point is that, as



1 Baker & Getty made it clear, the very purpose of subchapter 3  
2 was to fill in the gap wherever it existed with SIPA, so long  
3 as SIPA remained in place, and in other instances where  
4 customers engaged in securities transactions through their  
5 brokers or broker-dealers.

6 To the extent there's a suggestion in the record that  
7 this view be limited to U.S. intrastate brokers and not to  
8 brokers that are like RCM, foreign companies or at least  
9 foreign incorporated companies, I don't accept that view. The  
10 statute makes no distinction between U.S. or domestic  
11 corporations on the one hand and foreign corporations on the  
12 other. Moreover, RCM itself conducted almost all of its  
13 business from the United States. It employed United States  
14 management and employees and its business until it collapsed  
15 was to the benefit of the U.S. economy and to U.S. markets, and  
16 I don't see a basis, particularly in the absence of any such  
17 basis in the statute, for distinguishing such a business from  
18 intrastate brokers and excluding RCM's customers to the extent  
19 they're entitled to protection from the statute on that basis.

20 Secondly, the objectors to the motion point to the  
21 customer agreement, and in particular, Paragraph B of that  
22 agreement where they had a margin, to suggest that the  
23 customers of RCM normally took the risk that RCM could do  
24 whatever it pleased with the securities and other property that  
25 they left with RCM in their customer accounts notwithstanding

1 Section A of the customer agreement, quoted above, and  
2 therefore, that there was no real entrustment.

3           Having read the two paragraphs in Section B of the  
4 customer agreement, I don't accept that argument. It appears  
5 clear to me from the language of that agreement and those  
6 provisions that those provisions apply in the situation where  
7 customers have engaged in margin or financing transactions with  
8 RCM or its affiliates and that what the customers have given to  
9 RCM in those paragraphs is a security interest in their  
10 property until those transactions are paid off and the debt  
11 satisfied.

12           As Paragraph B2 states:

13           "Refco's sole obligation shall be to return to you  
14 such cash, like amounts of similar cash, securities and other  
15 property where the cash value thereof in the event of any  
16 liquidation of collateral to the extent they're not deemed to  
17 be collateral to secure transactions entered into pursuant to  
18 this agreement with any Refco entities or have not been applied  
19 against obligations owing by you to Refco entities whether as a  
20 result of liquidation of positions in any transactions entered  
21 into pursuant to this agreement or otherwise."

22           Although there are distinctions between this language  
23 and language in RSL's customer agreements and Mr. Litt's Schwab  
24 agreement, the essential point is the same, which is that these  
25 are provisions common in the industry, common to margin

1 accounts where the customers granted Refco a security interest  
2 in their property and expected its return once the margin loan  
3 or financing was satisfied.

4           As I stated earlier in quoting from Collier,  
5 subchapter 3 clearly contemplates that "customers" includes  
6 those who engaged in margin trading and provides for the  
7 netting out of short margin positions before access to the  
8 customer fund. So I do not see anything in these two  
9 paragraphs that will take the moving customer group members out  
10 of the notion that they entrusted their securities with -- or  
11 cash to purchase securities with RCM.

12           In addition, the objectants point to the boilerplate  
13 on the second page of RCM's standard form of confirmation of  
14 trades the customers received, as well as to Paragraph D2 of  
15 the customer agreement, which provides that:

16           "This agreement and insofar as such terms are  
17 recorded in a confirmation, each such confirmation and all  
18 amendments to any of such terms which together form the  
19 agreement between the parties shall together constitute a  
20 single agreement between the parties.

21           "The parties acknowledge that all transactions  
22 governed by the agreement are entered into in reliance upon the  
23 fact that all terms constitute a single agreement between the  
24 parties."

25           The confirm back-page boilerplate arguably goes

1 beyond the interpretation of the two paragraphs of the customer  
2 agreement dealing with margin loans that I discussed a moment  
3 ago, but not a whole lot. If one were to rely on the  
4 integration argument made by the objectors, however, it does  
5 say that RCM does not segregate any collateral or other  
6 property deposited with it. But that's really not a surprise  
7 since, again, from the language I quoted in Collier and the  
8 statute itself, Section -- I'm sorry, subchapter 3 of Chapter 7  
9 doesn't require segregation, and in fact deals with situations  
10 where customer securities were not segregated, and there was  
11 plenty of testimony that it's more often than not industry  
12 practice not to segregate into specific accounts collateral but  
13 to permit hypothecation of securities and cash and other  
14 property at least when a customer is trading in margin.

15           There is in addition an ambiguity in Paragraph 1 of  
16 the confirmation slip boiler-plate, which arguably refers not  
17 only to RCM's right to sell, pledge, hypothecate, assign,  
18 invest or use such collateral, but also says or property  
19 deposited with it, but I agree with the customer group that to  
20 read out customer status based on Paragraph A1 of the customer  
21 agreement on that ambiguous language would be a real stretch,  
22 given that it appears on the back of a confirm and deposited  
23 could be read as referring again to collateral. Particularly,  
24 I conclude this because of the language referring to the two -  
25 -the customer agreement and the confirm-- as being integrated

1 agreements. What again Section D2 says is:

2 "This agreement and insofar as such terms are  
3 recorded in a confirmation...they're integrated agreements. And  
4 I believe that refers back to D1 of the customer agreement,  
5 which says that transactions governed by the customer agreement  
6 shall be promptly confirmed in writing by the parties, defined  
7 term confirmations. The confirms that the parties received  
8 were just that, then, confirmations of the individual  
9 transactions, and it's logical to assume, and in fact, there's  
10 testimony in the deposition of Mr. Paglia (phonetic) that this  
11 was the assumption, that that memorialization of the individual  
12 transactions, as opposed to the boilerplate dealing generally  
13 with the use of margin collateral and other property, was what  
14 was meant to be covered by the integration provision in D2 of  
15 the customer agreement.

16 It's also argued that the customer agreements as well  
17 as other documents that the parties were aware of referred to  
18 RCM trading with the customers "as principal" or in a  
19 "principal" capacity. At least this was if not always RCM's  
20 practice, it was almost always RCM's practice.

21 It's therefore argued both in terms of applying the -  
22 - or construing whether the moving customer group members were  
23 "customers" that again they didn't entrust their securities  
24 with RCM because RCM was acting with them as a "principal."  
25 The same point is also made in connection with the stockbroker

1 definition itself, which I'll address in a moment.

2 But let me say now that while the language clearly  
3 says what it says and the testimony of Mr. York and Ms. Kraker  
4 was very clear as well as other testimony by RCM officers and  
5 employees that RCM traded as a "principal" and that was part of  
6 its business model, it is also crystal clear to me that it did  
7 so only to effectuate transactions as instructed and directed  
8 by its customers.

9 That is, RCM did not compete with its customers  
10 either in the marketplace in the sense of proprietary trading  
11 nor in terms of trying to strike the best bargain in a  
12 securities purchase or sale that it could as a true principal  
13 would in dealing with a customer.

14 Rather, it took the customer's order, went out to the  
15 market and filled that order, in each case, acting as the party  
16 to the transaction with the customer on the one hand and with  
17 the market party on the other.

18 As Mr. York testified, he would in this process  
19 always try to get the customer the best deal he could within  
20 the price range quoted to him. He was not and RCM was not  
21 compensated on the basis of the profit that it made at the  
22 customer's expense in selling to or buying from a customer a  
23 security for either the highest price in the case of a sale or  
24 the lowest price in case of a purchase as a true principal  
25 would, but, rather, on the agreed spread or markup between the

1 range of buy or sell-order prices that the customer would give  
2 it and what it could get from a counterparty in the  
3 marketplace.

4           As far as 741(2)(A) is concerned, my interpretation  
5 fo RCM's relationship with its customers is buttressed by the  
6 plain meaning of the statute, or the plain language of the  
7 statute which says that the debtor may deal with the customer  
8 "as principal or agent."

9           I also think that it's generally supported by the  
10 definition of a "broker" elsewhere in the Code -- I'm sorry,  
11 elsewhere outside of the Code, either in SEC no action letters  
12 are in the UCC.

13           For example, Official Comment 14 to UCC Section 8-  
14 102, which distinguishes the term "broker" from the term  
15 "securities intermediary," states:

16           "The terms 'securities intermediary' and 'broker'  
17 have different meanings. Broker means a person engaged in the  
18 business of buying and selling securities as agent for others  
19 or as principal."

20           Similarly, the SEC no action letter that I referred  
21 to in oral argument earlier with Mr. Henkin that appears at  
22 2000 West Law 1742088 dated October 11, 2000 states that  
23 Section 384 of the Securities Exchange Act of 1934 defines a  
24 broker as any person that is "engaged in the business of  
25 effecting transactions and securities for the account of

1 others."

2 It then goes on in that context to say:

3 "A person effectuates transactions if he or she  
4 participates in securities transactions at key points in the  
5 chain of distribution. Such participation includes among other  
6 activities, selecting the market to which a securities  
7 transaction will be sent, assisting an issuer to structure  
8 prospective securities transactions, helping an issuer to  
9 identify potential purchasers of securities, soliciting  
10 securities transactions including advertising and participating  
11 in the order-taking or order-routing process; for example, by  
12 taking transaction orders from customers.

13 "Factors indicating that a person is engaged in the  
14 business include, among others, receiving transaction-related  
15 compensation, holding one's self out as a broker, as executing  
16 trades or as assisting others in completing securities  
17 transactions and participating in the securities business with  
18 some degree of regularity."

19 In addition, too, according to this no-action letter,  
20 indicating that a person is effecting transactions, soliciting  
21 securities transactions is also evidence of being engaged in  
22 the business.

23 In the light of that, I think Mr. York's testimony on  
24 a number of accounts is quite telling. He made it very clear  
25 that he was a salesman. He said he never turned away a



1 customer-- that the credit department might have, but he never  
2 did. He wasn't actually aware of whether the credit department  
3 had turned away a customer, but he never did.

4 He also made it clear that he was taking the  
5 customers' instructions at all times; in effect, effectuating  
6 their orders for their account. He stated that he would not  
7 reveal the counterparty to a transaction because he believed  
8 that, if he did that, his customers would then go to that  
9 counterparty because he would no longer be necessary. In  
10 essence, he was in the middle of the market.

11 He also made it clear that his compensation or RCM's  
12 compensation, rather, was for effectuating the transactions on  
13 the customer's behalf either in the form of commission, or in  
14 the fixed income area, in the form of a spread or markup that  
15 had previously been negotiated with the customer.

16 Finally, he testified that the phrase in Section A1  
17 of the customer agreement that Refco will act for your account  
18 was not a term of art, and that it simply meant what it says.

19 He was not the only witness on this point, of course.  
20 There's deposition testimony to the effect that Refco's  
21 business was the execution of transactions for others. See not  
22 only Mr. York's deposition at 65, 235, but also Mr. Weiss'  
23 deposition at 53, and also Mr. Weiss' deposition at 57 and 58,  
24 where he stated that RCM's business, including, the securities  
25 area, was essentially to "fill 'em"; that is, to fill orders

1 and "bill 'em"; that is, bill the customer for filling those  
2 orders.

3           Mr. York also made it clear more than once that he  
4 always got customers back their property when they asked for  
5 it, up until the date of RCM's collapse. In addition, it's  
6 quite clear that one of the functions RCM performed was to  
7 execute corporate actions on the customer's behalf, including  
8 in connection with corporate restructurings or refinancings or  
9 tender offers, sending letters to the issuer of securities  
10 confirming the customer's beneficial ownership of those  
11 securities.

12           All of these facts and all this evidence to me  
13 indicates clearly that while in a limited sense RCM acted as a  
14 principal in taking some execution risk away from the client,  
15 RCM effectuated transactions for the account of the client and  
16 not for its own account except in the sense that it expected to  
17 make money for what it was doing, because after all it was in  
18 business, but that money was in the form of a commission or  
19 payment for effectuating the transaction directed by the  
20 client.

21           The Bevill Bressler case at 67 B.R. 557 contends that  
22 it's irrelevant for purposes of whether someone is a customer,  
23 whether the customer traded "with" or "through" the broker--  
24 and as an aside it's clear from the recitation of facts that in  
25 Bevill Bressler the debtor there hypothecated and commingled